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No. 71-1084

In the Supreme Court of the United States

OCTOBER TERM, 1971

CHARLES F., MICHAEL L. AND L. M. ANDERSON
t/a ANDERSON SEAFOOD COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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OPINIONS BELOW

The opinion of the district court (Pet. App. C, pp. 13a-24a) is not reported. The opinion of the court of appeals (Pet. App. A, pp. 1a-11a) is reported at 450 F. 2d 567.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1971 (Pet. App. B, p. 12a). By order

dated January 11, 1972, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including February 25, 1972. The petition was filed on February 23, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly held that the captains and crews of fishing boats owned by petitioners were petitioners' employees for the purpose of the Federal Insurance Contributions Act (Section 3121, *et seq.* of the Internal Revenue Code of 1954) and the Federal Unemployment Tax Act (Section 3306, *et seq.*).

STATUTES AND REGULATIONS INVOLVED

Pertinent portions of Sections 3121 and 3306 of the Internal Revenue Code of 1954 and Sections 31.3121(d)-1 and 31.3306(i)-1 of the Treasury Regulations on Employment Tax (1954 Code) are set forth in Appendix D to the petition (pp. 25a-28a).

STATEMENT

Petitioners are engaged in the business of fishing for snapper. Their business activities embrace ownership of fishing boats, fishing for snapper in the Gulf of Mexico through contractual arrangements with boat captains, and the disposal of the catch on the open market. (Pet. App. 2a-3a, 14a.)

Petitioners fully equipped their vessels for snapper fishing, made and paid for all repairs and insurance

on the boats, and then secured the services of experienced fishermen to be captains of the vessels. The cost of supplies for each fishing trip was initially charged to petitioners, but was ultimately taken from the pay to which the captains and crews were entitled. The arrangement between captain and owner was oral and generally lasted over an extended period of time, although either party was free to terminate the relationship at the conclusion of any fishing trip. Once a captain was selected, he was furnished an equipped boat, and he assembled and supervised a crew. (Pet. App. 2a-4a, 14a-18a.)

The compensation of the captains and crews was measured by the volume of the catch, and neither captains nor crews were guaranteed any earnings if they failed to catch any fish. After deducting advances, the cost of supplies initially charged to petitioners, and federal income taxes, petitioners paid their captains and crews in accordance with the tally sheets delivered by the captains.

The captains usually determined the duration of fishing trips. They agreed to return the catches to the home port and docking facilities leased at the expense of petitioners. Unless petitioners gave their consent, the catches were to be delivered only to them at a negotiated price per pound agreed upon prior to the commencement of the trip. Though the boats were equipped with radios, the captains managed the details of the operation of the boats and the manner of fishing. However, petitioners reserved the right to control the results of the fishing venture, and they

interfered in the process to the degree necessary to assure a proper result. (Pet. App. 3a-4a; 15a-20a.)

Petitioners filed federal employment tax returns for the periods in issue and paid the employer's share of the Federal Insurance Contributions Act and Federal Unemployment Tax Act taxes due on the earnings of the captains and crews. Following disallowance of their claims for refund of these taxes, petitioners instituted this refund suit. (Pet. App. 20a.) The district court held favorably to petitioners that the captains and crews who operated petitioners' fishing boats were not their employees (Pet. App. 24a). On appeal, the Fifth Circuit reversed on the authority of *United States* v. *W. M. Webb, Inc.*, 397 U.S. 179, reversing, 402 F. 2d 956 (C.A. 5), on remand, 424 F. 2d 1070 (C.A. 5), certiorari denied, 400 U.S. 902. The court of appeals held as a matter of law on the undisputed material facts that the captains and crews operating petitioners' vessels were petitioners' employees because of the absence of a demise charter. (Pet. App. 10a-11a.)

ARGUMENT

The decision below is correct. There is no conflict of decisions or any other reason for further review.

1. In *United States* v. *W. M. Webb, Inc.*, 397 U.S. 179, reversing and remanding, 402 F. 2d 956 (C.A. 5), this Court held that the status of sea captains and crews for F.I.C.A. and F.U.T.A. purposes must be determined, not under control standards for land-based employment, but by reference to maritime law.

Maritime law has long provided that in the absence of a demise or bareboat charter the boat owner is an employer and the captain and crew are his employees. See *The Norland*, 101 F. 2d 967 (C.A. 9); *Stevens* v. *Seacoast Co.*, 414 F. 2d 1032 (C.A. 5); *Cromwell* v. *Slaney*, 65 F. 2d 940 (C.A. 1); Gilmore & Black, *The Law of Admiralty*, Sec. 4-23, p. 28. Because the facts in *Webb* fell short as a matter of law of amounting to a demise—an arrangement where the owner entirely relinquishes control, possession, and navigation of the boat[1]—it was concluded on remand that the captains and crews were employees of the boat owners. See *W. M. Webb, Inc.* v. *United States*, 424 F. 2d 1070 (C.A. 5), certiorari denied, 400 U.S. 902.

There are no significant differences between the material facts in *Webb* and those in the instant case. In both, the existence of a demise charter is negated by undisputed factual findings. Petitioners had the right to control the results of the fishing venture, and they interfered in the process to the degree necessary to assure a proper result (Pet. App. 3a-4a; 15a-20a). The captains were obliged to return the catch to petitioners or to places designated by them (Pet. App. 2a-3a, 15a, 19a-20a), and petitioners were free to terminate the relationship with their captains after each trip (Pet. App. 15a-16a). The court below thus correctly concluded that the arrangements—which were

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[1] See *United States* v. *Shea*, 152 U.S. 178, 189; *Peters* v. *Rohrman*, 272 Fed. 338 (N.J.); see also authorities cited in footnote 13 of the opinion of the court of appeals (Pet. App. 10a).

almost identical to those in *Webb*—did not meet the legal requirements of a demise, and properly held that under maritime law the captains and crews were petitioners' employees.

2. There is no merit to petitioners' contention (Pet. 8-12) that the court of appeals erred in considering Jones Act[2] cases in determining applicable maritime law. On the contrary, the control standards developed in Jones Act, maintenance and cure, and third-party liability cases provide an established network of rules and distinctions that are practically suited to the necessities of the sea. Indeed, this Court in *Webb* (397 U.S. at 192) referred to *The Norland*, *supra*, a Jones Act case, in observing that maritime law standards do no violence to the congressional purpose embodied in the F.I.C.A. and F.U.T.A. statutes. Petitioners' suggestion that maritime law should have one meaning for Jones Act and maintenance and cure cases, and another for F.I.C.A. and F.U.T.A. purposes, produces "the anomalous result of having maritime activities subject to standards, for social security tax purposes, other than those that are relevant to seafaring enterprises." It was this very result which this Court held in *Webb* (397 U.S. at 190) Congress had not intended.

3. Petitioners are also incorrect in contending (Pet. 13-14) that the court of appeals overstepped the proper bounds of appellate review. The facts of the arrangements between the boat owners and the captains

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[2] Merchant Marine Act, 1920, c. 250, 41 Stat. 988, Section 33 (46 U.S.C. 688).

and crews were essentially undisputed, and the findings were reached on the basis of a lengthy stipulation and testimony that was free of significant contradiction. The sole question was whether on the undisputed facts, as found, the arrangement amounted in law to a demise precluding an employer-employee relationship. That question is a legal one which the court of appeals was free to resolve.[3]

4. Finally, there is no basis for petitioners' assertion (Pet. 14-15) that the decision below violates the "uniformity" requirements of Article I, Section 8, Clause 1 of the Constitution. Under this Court's decision in *Webb*, all boat owners, not only those in the Fifth Circuit, will have their tax liability determined under maritime law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] In *Guzman* v. *Pichirilo*, 369 U.S. 698, on the other hand, upon which petitioners rely (Pet. 14), the underlying facts were in dispute.

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